Table of Contents.

Table of Authorities Cited.

CASES.

STATUTES, ETC.

Constitution, statutes and rule.

MISCELLANEOUS.

Public documents, books and articles.

In the Supreme Court of the United States.

OCTOBER TERM, 1969.

No. 305.

UNITED STATES OF AMERICA,
Appellant,
v.
JOHN HEFFRON SISSON, JR.,
Appellee.

MOTION TO AFFIRM.

Pursuant to Rule 16.1(d) of the Rules of the Supreme Court of the United States, appellee, John Heffron Sisson, Jr., moves to affirm the order of the United States District Court for the District of Massachusetts granting his motion in arrest of a judgment of conviction. The opinion of the District Court is reported at 297 F. Supp. 902.

Questions Presented.

1. Whether the Military Selective Service Act of 1967, 50 U.S.C. App. §§ 451 *et seq.* (hereinafter sometimes referred to as the "Act"), violates the First Amendment's directive that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" when applied to compel military service by some conscientious objectors, but not others.

2. Whether Congress has the power to compulsorily conscript a conscientious objector to fight in time of peace.

3. Whether Congress has the power to procure manpower for the military by compulsory conscription in time of peace.

4. Whether the legality and constitutionality of the Government's military participation in the Vietnam conflict is a justiciable issue and, if it is not, whether the District Court has jurisdiction over a criminal prosecution wherein the illegality of such participation is relied upon as a defense.

Statute Involved.

Section 4(a) of the Act, 50 U.S.C. App. § 454(a) provides in pertinent part:

> "The President is authorized, from time to time, whether or not a state of war exists, to select and induct into the Armed Forces of the United States . . . such number of persons as may be required to provide and maintain the strength of the Armed Forces. . . ."

Section 6(j) of the Act, 50 U.S.C. App. § 456(j) provides in pertinent part:

> "Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code. . . ."

Section 12(a) of the Act, 50 U.S.C. App. § 462(a), provides in pertinent part:

> "Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both . . ."

Statement.

Sisson is a nonreligious conscientious objector to participation in the Vietnam conflict. (Jurisdictional Statement, pp. 7-8.) He was indicted and convicted on the charge of refusal to submit to induction.

In moving for arrest of judgment, Sisson renewed claims first advanced in his pretrial motion to dismiss the indictment on the grounds that (1) the Act violates the nonestablishment and free exercise clauses of the First Amendment, or alternatively the right to be a conscientious objector under the Ninth Amendment; (2) the Act is unconstitutional because the Vietnam war is illegal, under both domestic and international law, and Congress has no constitutional power to raise armies for illegal wars; (3) the Act is unconstitutional because Congress has no power to authorize compulsory conscription into the military during peace time; and (4) if the District Court cannot adjudicate the legality of the Vietnam war because of the "political question" doctrine, then either the court has no jurisdiction under Article III of the Constitution to adjudicate

Sisson's guilt or innocence, or the court cannot exercise such jurisdiction without violating due process by depriving Sisson of a potentially valid defense.

The District Court found Sisson to be a sincere conscientious objector, holding genuine and profound ethical and moral values, but lacking the "religious training and belief" prescribed by the Act. The District Court also found Sisson's belief that the war is illegal to be a reasonable belief. 297 F. Supp. at 904-905.

The District Court granted Sisson's motion in arrest of judgment, holding that (1) the Act violates the "non-establishment" clause by discriminating between religious and nonreligious conscientious objectors; and (2) the Act violates the "free exercise" clause by compelling a conscientious objector to fight in an undeclared foreign war. The District Court rejected Sisson's contentions that (3) Congress has no power to draft a conscientious objector, whether in time of peace or in time of war; (4) Congress has no power to conscript anyone during peace time; and (5) the District Court can have no jurisdiction of the offense charged if the legality of the Vietnam war is a political question.

The District Court expressly based its decision arresting the judgment of conviction for insufficiency of the indictment "upon the invalidity . . . of the statute upon which the indictment . . . is founded," within the meaning of this phrase as used in 18 U.S.C. § 3731. 297 F. Supp. at 912.

Jurisdiction.

Appellee concurs with appellant that 18 U.S.C. § 3731 confers jurisdiction upon this Court to review on direct appeal the decision of the District Court and he adopts the reasons set forth in the Jurisdictional Statement, pp. 7-10.

It is self-evident that the questions presented are of general importance. The District Court construed the indictment, a matter not presently open to review, and explicitly based its finding of insufficiency on the unconstitutionality of the Act. Morever, the decision below conflicts with decisions with respect to which petitions for writs of certiorari are pending; *Vaughn* v. *United States,* No. 116 Misc., 1969 Term; *McQueary* v. *United States,* No. 88 Misc., 1969 Term; and *Welsh* v. *United States,* No. 76, 1969 Term.

Of course, the jurisdiction of this Court is not limited to the questions presented by appellee. It extends to certain questions decided in favor of the Government by the District Court and it is now open to this Court to inquire whether the judgment can be sustained upon rejected grounds which challenge the validity of the Act. *United States* v. *Curtiss-Wright Export Corp.,* 299 U.S. 304, 329-330; Stern & Gressman, Supreme Court Practice, p. 357 (4th ed. 1969).

Argument.

1. The Act Violates the First Amendment Prohibition against Laws Respecting an Establishment of Religion.

The District Court held that the Act violates the First Amendment provision that "Congress shall make no law respecting an establishment of religion" because it requires a nonreligious conscientious objector, like Sisson, to be subject to conscription to kill in Vietnam but does not impose the same requirement on the religious conscientious objector. It is undisputed that Sisson is a nonreligious conscientious objector. (Jurisdictional Statement, pp. 7-8.)

The Act violates the basic constitutional principle that the Government may not discriminate in favor of adherents of organized religions and against nonbelievers. Sisson's repugnance to being forced to fight and kill is, as the District Court found, as deeply founded and as sincere as that of any church member. Yet the Act excludes from the pool of men subject to conscription only ". . . any person . . . who, *by reason of religious training and belief,* is conscientiously opposed . . ." 50 U.S.C. App. § 456(j). (Emphasis added.) Undoubtedly, the Act ". . . influence[s] a person . . . to profess a belief" in religion, however broadly the word "religion" may be defined, since it releases the "religious" conscientious objector from obligatory military service, and thereby the Act fosters an establishment of religion. *Everson* v. *Board of Education of the Township of Ewing,* 330 U.S. 1, 15-16; *Torcaso* v. *Watkins,* 367 U.S. 488, 492-495.

Even if Sisson's beliefs could be classified as "religious" by extending the rationale of *United States* v. *Seeger,* 380 U.S. 163, the Act would remain invalid because it favors "pacifist" religions in specifying that the statutory deferment from military service is available only to conscientious objectors who oppose "war in any form," 50 U.S.C. App. § 456(j), a phrase which has been interpreted to mean "opposition to all wars" in decisions cited with approval by the Government (Jurisdictional Statement, p. 12). The Act thus discriminates against religions which espouse a so-called "just war" doctrine.

Indeed, there is evidence that the Act, as written, is intended to discriminate even among "pacifist" religions: a clause which was construed by this Court in *United States* v. *Seeger, supra,* was eliminated from the Act in 1967 with the apparent purpose ". . . to more narrowly construe the basis for classifying registrants as 'conscientious objectors.'" 1967 U.S. Code Cong. & Ad. News, pp. 1333-1334.

In short, the Act (1) tends to establish religion, (2) tends to establish pacifist religions, and (3) tends to establish some pacifist religions, but not others. Whether the statutory deferment of a special breed of conscientious objectors be viewed as the conferring of a public "benefit," *Sherbert* v. *Verner*, 374 U.S. 398, 404, or as an exemption from a public "duty," *Speiser* v. *Randall*, 357 U.S. 513, 518, 526, the Act is invalid. Nor can it be saved by invoking the thoroughly discredited theory that the Government can discriminate in awarding "privileges"—*see, e.g.*, Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

The Government's confession that the Act is infirm, but that the infirmities are critical to "a manageable, tangible test susceptible of administrative and judicial application" (Jurisdictional Statement, p. 15), hardly demonstrates the sort of compelling interest needed to justify governmental interference with First Amendment rights. Distinguishing sincere nonreligious objectors from malingerers is no more difficult than doing the same thing for religious claimants of exemption. If anything, the sincerity of a nonreligious claimant is the easier to test since he cannot take shelter behind the phraseology of his church's doctrines. Unless mere formal membership in a church opposing all war is to entitle one to exemption—which no one has ever asserted—the administrative advantage supposed to inhere in discrimination against the nonreligious is simply nonexistent, and surely far from overwhelming.

Indeed, the administration of the Act, far from justifying it, necessarily aggravates its constitutional flaws. That administration is riddled with inexpertise, arbitrariness, and procedural flaws. *See* White, Processing Conscientious Objector Claims: A Constitutional Inquiry, 56 Calif. L. Rev. 652 (1968). Beyond this, even the best of all pro-

cedural mechanisms would founder before the impossible task imposed by the statute: how can Sisson's claim of "conscience" be compared with "religious training and belief" on the one hand, but divorced from "philosophical views" or a "personal moral code" on the other? 50 U.S.C. App. § 456(j). By prescribing such a distinction, furthermore, the Act invites semantic argument and compels arbitrariness in decision-making.

In brief, the Act not only encourages the establishment of religion on its face, but the vagueness of its standards makes hopeless any attempt at rational, consistent application of its provisions and hence aggravates the religious discrimination forbidden by the First Amendment.

2. Congress has No Power to Conscript a Conscientious Objector, and in Particular, Congress has No Power to Compel Military Service in an Undeclared War Overseas.

The District Court held that Congress has no power to draft conscientious objectors for combat duty in a distant conflict without a declaration of war. 297 F. Supp. at 907-911. According to the Government, Congress has an unlimited power to conscript anyone, at any time, for military service anywhere; Congress may choose to draft some persons, but not others, and there can be no judicial review either of the occasion for the exercise of the power, or its scope, or the manner in which it is exercised. (Jurisdictional Statement, pp. 11-13.)

There is no need to labor appellant's refusal to admit the necessity of accommodating the congressional power to raise armies with the individual's constitutional rights, such as the right to be a "conscientious objector." It was precisely the fear of arguments for the expediency of un-

bridled legislative and executive power which prompted the adoption of the Bill of Rights: the first eight amendments in terms limit the power of the federal government, while the ninth and tenth amendments reemphasize the fundamental principle that Congress and the Executive can exercise only powers delegated to them by the Constitution. The First Amendment, in question here, is directed squarely at "Congress."

In light of the constitutional scheme, the need for judicial review in this area is manifest. *United States* v. *Robel,* 389 U.S. 258, 263-264; *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 587, 603, 646. The importance of the individual in that scheme has been expressed as follows:

> ". . . the principal distinction between the free world and the Marxist nations is traceable to democracy's concern for the rights of the individual citizen, as opposed to the collective mass of society. And this dedication to the freedom of the individual, of which our Bill of Rights is the most eloquent expression, is in large measure the result of the nation's religious heritage."
>
> *United States* v. *Seeger,* 326 F. 2d 846, 854-855 (2d Cir. 1964), aff'd 380 U.S. 163.

This Court has a constitutional mandate to protect the full measure of individual human rights belonging to Sisson against encroachment by the assertion of governmental power inconsistent with such rights.

Sisson's position, rejected by the District Court, is that the Constitution absolutely prohibits military conscription of conscientious objectors, so that the judicial inquiry ends when an individual is determined to be a conscientious objector. This right of conscience is traceable

to James Madison, and through him to both the First and Ninth Amendments. I Annals of Congress, 434; Brant, Madison: On the Separation of Church and State, William & Mary Quarterly, Series III, vol. 8, 1951. Sisson does not assert a general right of unlimited scope to follow the dictates of his conscience, *see, e.g., McGowan* v. *Maryland,* 366 U.S. 420, 437, 440, but rather a limited right of conscience in the context of objection to war. And if Chief Justice Stone was correct in admonishing: ". . . both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to [this] view . . ." (The Conscientious Objector, 21 Columbia University Quarterly, No. 4, October 1919, pp. 268-269), then it necessarily follows that the right to be a conscientious objector is a "fundamental" right with deep roots in the "traditions and [collective] conscience of our people," and protected by the Ninth Amendment. *Griswold* v. *Connecticut,* 381 U.S. 479, 493 (concurring opinion of Mr. Justice Goldberg joined by the former Chief Justice and by Mr. Justice Brennan).* A Ninth Amendment base for this right may be especially appropriate since it would avoid any arguable difficulty in equating acts of conscience with traditionally religious acts in all circumstances. As Mr. Justice Stone observed, affirmatively forcing action against conscience is particularly offensive to our traditions:

> ". . . there . . . is a very radical distinction between compelling a citizen to refrain from acts which he regards as moral but which . . . the law regard[s] immoral . . . and compelling him to do affirmative acts which he regards as unconscientious and immoral." *Op. cit.*

*This case, unlike *Griswold,* of course does not involve the problem of "incorporation" of the Ninth Amendment in the Fourteenth; only federal action is in question here.

This distinction finds considerable support in Clark, Judicial Process and the Free Exercise of Religion, to be published in the December, 1969, issue of the Harvard Law Review, the proofs of which will be provided to this Court when available; *see West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 642.

The District Court rejected Sisson's claim of absolute right, whether based on the First or on the Ninth Amendment, and found instead a qualified right to be a conscientious objector in the free exercise clause of the First Amendment. This right, according to the District Court, may be exercised by Sisson to object only to combatant duty and only in the absence of a declared war or an invasion of the country. That is, the District Court held that in declared wars or invasions, Congress would have the power to conscript all men, including conscientious objectors. The District Court held, however, that Congress had no power to conscript Sisson (a conscientious objector) to kill in Vietnam.

The Government suggests, Jurisdictional Statement, p. 11, n. 8, that Sisson has no standing to attack the constitutionality of his induction because he would not necessarily have been sent to fight in the war to which he conscientiously objected. The District Court, however, not merely held that Sisson had standing to raise this issue, but allowed him—so far as standing was concerned—to attack the legality of the war itself. 294 F. Supp. 511, 512-513. The Government seems to concede that the District Court was right in observing that a soldier cannot challenge his transfer to Vietnam, either in military or in civilian courts; but the Government is unwilling to accept the logic of the District Court's reasoning that if there is to be effective review of the Army's right to compel service in Vietnam, then such review must come at the point of in-

duction, before the civilian turns soldier. Instead, the Government attempts to circumvent this logic by asserting that it ". . . has little bearing on the crucial issue here. . . ." (Jurisdictional Statement, n. 8). As the Government would have it, Sisson does not have a "sufficiently direct interest" unless he is under orders transferring him to Vietnam, despite the fact that at such time Sisson would be barred by "other considerations," *id.*, from obtaining judicial review of such orders. The argument is based on the possibility that Sisson will not be ordered to the Vietnam theater. But that argument ignores the substantial possibility that Sisson *will* be shipped to Vietnam and that possibility, coupled with the impossibility of obtaining judicial review if it materializes, surely endows Sisson with a sufficient "personal stake" in the issue, within the meaning of that phrase as repeatedly used by this Court:

> "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?' *Baker* v. *Carr,* 369 U.S. 186, 204."

Flast v. *Cohen,* 392 U.S. 83, 99. Indeed, the prison term which menaces Sisson in itself goes far towards inducing the "concrete adverseness" referred to by the Court. Also, the disruptive effects of conscientious refusals to serve on the conduct of the armed forces will obviously be far greater if that refusal is postponed to the moment when an actual order to fight is given. The system prescribed by Congress avoids such disruption; the inductee is given one chance—his last chance—to refuse service, or to step forward and take a definitive oath of obedience. At this moment, the

moment foreseen by Congress for judicial review, *see* 50 U.S.C. App. § 460(b)(3), Sisson asserted what he claims to be his constitutional right not to be drafted for service in an undeclared, foreign war, against the dictates of his conscience. If that right is to be preserved, the military cannot be allowed to defer its exercise to a time when judicial review is impossible.

Thus, while Sisson clearly has standing to ask for an adjudication of the legality of the Government's participation in the Vietnam war, such "standing" in the technical sense is not essential to support the decision of the District Court. For if the qualified "right" acknowledged by the District Court is to be preserved, then the right must be exercised prior to induction—afterwards, he could be shipped to Vietnam, and the right would be forever lost.

The District Court's decision should therefore be affirmed, whether the right to be a conscientious objector is absolute or qualified.

3. Congress has No Constitutional Power to Compel Military Service in Vietnam without a Declaration of War.

The District Court rejected Sisson's contention that Congress has no power to authorize conscription in time of peace and, in particular, that Congress has no power to authorize compulsory military service in armed international conflict overseas in the absence of a declaration of war. The existence of this power is an open question. *Hamilton* v. *Regents of the University of California*, 293 U.S. 245, 265; *Mora* v. *McNamara*, 389 U.S. 934-937; *Holmes* v. *United States*, 391 U.S. 936, 938-949; *Hart* v. *United States*, 391 U.S. 956; *McArthur* v. *Clifford*, 393 U.S. 1002. While the reluctance of this Court to resolve this delicate

question is readily understandable, the question can no longer be avoided without seriously undermining the fundamental principle that ours is a government of laws and not of men. Judicial silence in the face of governmental acts widely believed to be lawless is certain to destroy respect for our legal institutions and thereby to destroy the values whose preservation has been entrusted to Congress and the Executive.

And once confronted, the question has but one answer. The historical record is not susceptible of two interpretations. Indeed, that record raises the gravest of doubts about the power of Congress to conscript at any time (the decision in the *Selective Draft Law Cases,* 245 U.S. 366, notwithstanding). This is shown by Alexander Hamilton's discourses in The Federalist; by the deliberations in the Constitutional Convention of 1787; by the deliberations of the First Congress on the subject of the Second Amendment; by the proposals, declarations and debates of the state constitutional ratification conventions; by the writings of Thomas Jefferson, Henry Knox and George Washington; by the history of the "draft bill" of 1814; and by the history of the Civil War Draft Act, among other sources. Adams, Life and Writings of John Adams, Vol. IX, Boston (1854), p. 465; Annals of the Congress of the United States, vol. I, pp. 434, 749-750, 767; vol. II, pp. 1076, 2067 ff., 2101; vol. XXVIII, pp. 70 ff., 79-80; Bernstein, "Conscription and the Constitution: the Amazing Case of Kneedler v. Lane," 53 A.B.A.J. 708 (1967); Black, "The Selective Draft Law Cases," XI Bos. L. Rev. 37 (1937); Conscience in America, E. P. Dutton & Co., N.Y. (1968), pp. 49-54, 64-71; Corwin, The Constitution and What It Means Today, Atheneum, N.Y. (1965), p. 71; Elliot's Debates, J. B. Lippincott Co., Philadelphia (1891), vol. II, p. 552, vol. III, pp. 425-426; Life and Writings of Thomas Jefferson, Mod-

ern Library, N.Y., pp. 219, 450 ff., 456 ff., 547 ff., and 600 ff.; Leach, Conscription in the United States: Historical Background, Chas. E. Tuttle Pub. Co., Rutland, Vt. (1952), pp. 356-359, and ch. V; Madison, Notes on the Debates in the Federal Convention of 1787, from Documents Illustrative of the Formation of the Union of the American States, Gov. Print. Off. (1928), pp. 475, 564-571, 580-581, 598-603, 621, 725-726, 728, 1030-1032, 1035, 1043, 1047, 1055, and 1057; Ramsey, Life of Washington, vol. II, p. 246; Taney, "Thoughts on the Conscription Law of the United States," an unpublished manuscript available at the New York City Public Library; The Basic Writings of George Washington, Random House, N.Y., pp. 468 ff. 479-480; The Federalist, No. 22, pars. 5, 6; No. 23, par. 4; No. 24, par. 11; No. 25, par. 8; No. 26, par. 4; No. 29, pars. 6, 7, 11, 12 and 13; and 86 Cong. Rec. App. 5206-5210 (where is printed the brief submitted in 1940 by the Lawyers' Committee to Keep the United States out of War.)

Nor can it be maintained that peacetime conscription is a power "necessary and proper" to wage an undeclared war, for the draft is wasteful and unnecessary, 109 Cong. Rec. 3413-3417; 110 Cong. Rec. 8575-8576, 8578-8580, 8586-8587, 15365-15371; "Review of the Administration and Operation of the Selective Service System," Hearings before the Committee on Armed Services, House of Representatives, 89th Congress, Second Session, June 28 and 29, 1966, 9756-9761, 9872-9880. Indeed, a former Assistant Secretary of Defense testified at the above-mentioned hearings on June 30, 1966, that the added cost of an all-volunteer army would range from 5 to 9 billion dollars. Even accepting that figure (and rejecting the evidence that elimination of the draft would reduce, instead of increase, the cost of maintaining our armed forces), there cannot be said to exist the sort of "clear and present danger" to render

"necessary and proper" the draft which, by definition, deprives the conscript of his liberty and significantly enhances the risk to his life: if a sufficiently clear and present danger existed, either Congress could declare war or Congress could raise the revenues necessary for an all-volunteer army through additional taxes.

It is entirely proper, of course, for this Court to inquire into the sufficiency of so-called "legislative facts" to support a congressional finding of necessity. *Smith* v. *California,* 361 U.S. 147, 165, 172; *Borden's Farm Products Co., Inc.* v. *Baldwin,* 293 U.S. 194, 209-210; *Whitney* v. *California,* 274 U.S. 357; Alfange, The Relevance of Legislative Facts in Constitutional Law, 114 Pa. L. Rev. 637, 648 (1966).

Any deference normally due to the judgment of the Congress—or rather of the president, who has chosen to exercise the discretion vested in him by 50 U.S.C. App. § 454(a)—is irrelevant here because that judgment does not rest upon proper considerations of military needs. The truth about the draft appears in the following excerpts from the "Channeling" memorandum issued by the Selective Service System on July 1, 1965, Gov. Print. Off. 899-125:

> "One of the major products of the Selective Service classification process is the channeling of manpower into many endeavors, occupations, and activities that are in the national interest. . . .
>
> "The opportunity to enhance the national well being by inducing more registrants to participate in fields which relate directly to the national interest came about as a consequence, soon after the close of the Korean episode, of the knowledge within the System that there was enough registrant personnel to allow stringent deferment practices employed during war time to be relaxed or tightened as the situation might

require. Circumstances had become favorable to induce registrants, by the attraction of deferment, to matriculate in schools and pursue subjects in which there was beginning to be a national shortage of personnel. These were particularly in the engineering, scientific and teaching professions. . . .

"In the Selective Service System the term 'deferment' has been used millions of times to describe the method and means used to attract to the kind of service considered to be most important, the individuals who were not compelled to do it. The club of induction has been used to drive out of areas considered to be less important to the areas of greater importance in which deferments were given, the individuals who did not or could not participate in activities which were considered to be essential to the defense of the Nation. The Selective Service System anticipates further evolution in this area. . . .

"Since occupational deferments are granted for no more than one year at a time, a process of periodically receiving current information and repeated review assures that every deferred registrant continues to contribute to the overall national good. . . .

"In the less patriotic and more selfish individual it engenders a sense of fear, uncertainty, and dissatisfaction which motivates him, nevertheless, in the same direction. He complains of the uncertainty which he must endure; he would like to be able to do as he pleases; he would appreciate a certain future with no prospect of military service or civilian contribution, but he complies with the needs of the national health, safety, or interest—or is denied deferment.

"Throughout his career as a student, the pressure —the threat of loss of deferment—continues. It continues with equal intensity after graduation. . . .

"The device of pressurized guidance, or channeling, is employed on Standby Reservists. . . .

"If he attempts to enlist at 17 or 18 and is rejected, then he receives none of the impulsion the System is capable of giving him. If he . . . is not rejected until . . . age 23, he has felt some of the pressure but thereafter is a free agent.

"This contributed to the establishment of a new classification of 1-Y (registrant qualified for military service only in time of war or national emergency). This classification reminds the registrant of his ultimate qualification to serve and preserves some of the benefit of what we call channeling. . . .

"From the individual's viewpoint, he is standing in a room which has been made uncomfortably warm. Several doors are open, but they all lead to various forms of recognized, patriotic service to the Nation. Some accept the alternative gladly—some with reluctance. The consequence is approximately the same. . . .

"Delivery of manpower for induction, the process of providing a few thousand men with transportation to a reception center, is not much of an administrative or financial challenge. It is in dealing with the other millions of registrants that the System is heavily occupied, developing more effective human beings in the national interest."

Such a blatantly undemocratic "System" can be sanctioned under the constitutional power to "raise armies" only if our entire population is seen as an "army," our nation as an armed camp, our people as so much war materiel to be marshalled in the "national interest." One may wonder whether the current crisis of unrest in our schools,

on our campuses, and in urban areas, can be attributed to the frustrations built up among people, young and old, by the unnatural pressures of a system bent on the metamorphosis of Athens into Sparta.

To sum up, there is no power to conscript in peace time, peacetime conscription is not necessary, and in any event the function of the Act is the constitutionally impermissible one of mobilizing a civilian army rather than procuring manpower for the military.

4. THE DISTRICT COURT HAS NO JURISDICTION OVER SISSON'S PROSECUTION IF THE ISSUE OF LEGALITY OF THE GOVERNMENT'S PARTICIPATION IN THE VIETNAM WAR IS A POLITICAL QUESTION.

The District Court held that while Sisson had standing to challenge the legality of the Vietnam conflict, the question of legality under the Constitution and relevant principles of international law is a "political" question, whose determination is entrusted by the Constitution to the coordinate political branches, and therefore not justiciable. The District Court then rejected Sisson's argument that the Court's political question ruling has the effect of depriving him of one or more valid defenses, that the court has no jurisdiction under Article III of the Constitution over criminal cases in which valid constitutional defenses are barred as involving political issues and, consequently, that his prosecution violates due process. Briefly stated, Sisson maintains that, axiomatically, Congress has no power to raise armies to fight an illegal, undeclared war and the Act, if construed to authorize the order conscripting Sisson, is unconstitutional as applied because the Government's military participation in the Vietnam conflict violates international law and the constitutional require-

ment of a declaration of war. Sisson is entitled to his defense:

> "There is something basically wrong and unjust about a juridical system that sanctions the imprisonment of a man without ever according him the opportunity to claim that the charge made against him is illegal."

Mr. Justice Murphy concurring in *Estep* v. *United States*, 327 U.S. 114, 131.

Commenting on the *Estep* decision, the late Professor Henry M. Hart, Jr., said:

> "Three Justices of the Supreme Court of the United States were willing to assume that Congress has power under Article I of the Constitution to direct courts created under Article III to employ the judicial power conferred by Article III to convict a man of a crime and send him to jail without his ever having had a chance to make his defenses. No decision in 164 years of constitutional history, so far as I know, had ever before sanctioned such a thing. Certainly no such decision was cited." (Footnote omitted.)

Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1382 (1953).

Three alternatives are available: (1) if the legality of the war is a political question, the District Court has no jurisdiction over this criminal prosecution; (2) if the legality of the war is not a political question (see the questions posed by Mr. Justice Douglas dissenting in *Mitchell* v. *United States*, 386 U.S. 972, 973-974, and by Mr. Justice Stewart in *Mora* v. *McNamara*, 389 U.S. 934) then the case probably must be remanded to the District Court for

determinations of fact—such as the facts set forth in Falk, Vietnam and International Law (O'Hare Books, 1967), and In The Name of America (E. P. Dutton & Co., Inc.); (3) adjudicating the legality of the war may be unnecessary if Sisson's belief in the war's illegality (a reasonable belief, as the District Court found) is a complete defense to the charge against him, *i.e.*, if specific intent is an element of the offense, and its existence is negated by a reasonably held belief that the war is illegal. Cf. The William Gray, 29 Fed. Cas. 1300, No. 17,694 (C.C. N.Y. 1810).

In the context of Article 6(a) and Article 8 of the Treaty of London, August 8, 1945, 59 Stat. 1544, which impose "individual responsibility" for determining the legality of a war, any of the above three alternative dispositions would satisfy the minimum requirements of justice, but perhaps the most appropriate is the third one: if the individual must bear responsibility, what more can be required than that he be reasonable?

Conclusion.

For the foregoing reasons, appellee respectfully submits that this Court should affirm the judgment of the District Court arresting his judgment of conviction.

JOHN G. S. FLYM.

August, 1969.